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INTEREST OF *AMICI*

The undersigned *amici curiae*, the Attorneys General of Alabama and of nineteen other States, submit this brief in support of respondents G. Michael Dobson and Wanda C. Dobson.

As constitutional officers of the States they represent, *amici* have the responsibility to defend the vital interests of federalism at issue in this case. *Amici* submit that the Federal Arbitration Act ("FAA") creates binding uniform law only in the *federal* courts. The instant case arose in the *state* courts of Alabama. To apply the Act to proceedings in state court, as petitioners seek to do, would fly in the face of fundamental principles of state sovereignty.

SUMMARY OF ARGUMENT

Until this Court's decision in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), this Court had never countenanced the application of the Federal Arbitration Act in state court proceedings. Indeed, after the passage of the Act in 1925, lower courts and commentators were unanimous in their conclusion that the FAA did *not* apply to state courts.

In *Southland*, this Court extended the FAA to cover state court proceedings, in a majority opinion written by Chief Justice Burger and joined by Justices Brennan, White, Marshall, Blackmun, and Powell. But this Court was denied the benefit of adversarial briefing on the matter. The appellees in *Southland* erroneously assumed that the Act governs proceedings in state court, based on dictum in this Court's decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), and appellees conceded the point in their brief.[1] Yet *Moses H. Cone* was a diversity action that did not arise in state court and therefore could not have decided the issue. The issue was raised in *Southland* only briefly in oral argument, largely because "the parties stipulated in the court below that . . . the

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[1] *See* Brief of Appellees in No. 82-500 (filed June 6, 1983) at 25 n.30; *Keating v. Superior Court*, 31 Cal.3d 584, 604, 645 P.2d 1192, 1203, 183 Cal. Rptr. 360, 371-72 (1982).

federal Act applied."[2] Because the questions presented in *Southland* did not explicitly identify the Act's application to state court as the issue to be decided by this Court,[3] *amici* were not put on notice and consequently did not participate.

But the institutional interests of the States — and, indeed, of the entire system of federalism — cannot be waived by a private litigant. Justice O'Connor's dissent in *Southland*, 465 U.S. at 21-36, in which the current Chief Justice joined, is demonstrably correct and should be adopted by this Court as the proper interpretation of the FAA. Justice O'Connor explained that the text and structure of the Act clearly indicate that it does not apply to proceedings in state court, and she exposed the fundamental defects in the majority's reasoning.[4]

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[2] Tr. Oral Arg. in No. 82-500, at 6 (quoting counsel for appellants). One Justice asked, "Do you think [Congress] intended the Federal Arbitration Act to apply to state courts at all?," *id.* at 7, and told *counsel for appellants*, Southland, et al., that "the evidence of what Congress intended is pretty clearly against you." *Id.* at 8. Counsel for appellants responded by asserting that *Moses H. Cone* "specifically held" that the FAA governed proceedings in state court." *Id.* at 7. Under questioning, counsel was forced to akcknowledge that the comment in *Moses H. Cone* was only dictum. *Id.* at 7-8.

[3] This Court framed the questions presented as:

> (a) whether the California Franchise Investment Law, which invalidates certain arbitration agreements covered by the Federal Arbitration Act, violates the Supremacy Clause and (b) whether arbitration under the federal Act is impaired when a class-action structure is imposed on the process by the state courts.

465 U.S. at 3.

[4] Writing separately, Justice Stevens agreed that — as enacted in 1925 — the FAA did not apply to state court proceedings and that "the 1925 Congress that enacted the statute viewed the statute as essentially procedural in nature." 465 U.S. at 17 (opinion concurring in part and dissenting in part). But he believed that the meaning of the law had somehow changed over time: "I am persuaded that the intervening developments in the law compel the conclusion that the Court has reached." *Id.*

Subsequently, Justice Stevens stated more critically that, "[e]ven though the Arbitration Act had been on the books for almost 50 years in 1973, apparently neither the Court nor the litigants even considered the possibility that the Act had pre-empted state-created rights. It is only in the last few years that the Court has effectively rewritten the statute to give it a pre-emptive scope that Congress certainly did not intend." *Perry v. Thomas*, 482 U.S. 483, 493 (1987) (Stevens, J., dissenting).

This case is ultimately more about federalism than about arbitration. *Amici* submit that each State is entitled to decide for itself how to govern proceedings in its own courts. Most of the States have chosen to facilitate arbitration. But the FAA should not be read to compel them to do so. "The essence of federalism is that States must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington v. Texas*, 441 U.S. 418, 431 (1979). The role of States as laboratories of democracy, *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), is especially salient here. It was, after all, the New York arbitration statute that served as the model for the federal Act, and it was the explicit intent of the FAA's drafters to permit each State to adopt its own arbitration policy according to its own unique circumstances and interests.

We recognize that statutory interpretations should not be discarded lightly. But *Southland's* extension of the FAA to state courts was rendered without briefing based on an imprudent concession by a private litigant, is demonstrably incorrect, and is in tension with important principles of judicial restraint and federalism, as reflected in such recent decisions in *O'Melveny & Myers v. FDIC*, No. 93-489 (June 13, 1994), *New York v. United States*, 112 S. Ct. 2408 (1992), *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991), and *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). Subsequent decisions involving the FAA, such as *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 477 n.6 (1989) (permitting parties contractually to agree to adopt state procedural rules of arbitration and reserving the question whether FAA §§ 3 and 4 are applicable in state court), have also undercut the logic of *Southland*.[5]

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[5] *See, e.g., Comment, The Federal Arbitration Act: Conflicting Interpretations of its Scope*, 61 U. Cin. L. Rev. 623, 646 (1992) ("The *[Volt]*

The failure of Congress to override *Southland* by legislation cannot be treated as decisive.[6] This Court has been willing to overturn judicial decisions interpreting statutes where the "development of the law," including "the growth of judicial doctrine," has "removed or weakened the conceptual underpinnings from the prior decision." *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989). "[W]here the later law has rendered the decision irreconcilable with competing legal doctrines or policies, the Court has not hesitated to overrule an earlier decision." *Id.* (citations omitted). *See, e.g., Director, OWCP v. Greenwich Collieries*, 62 U.S.L.W. 4543 (June 20, 1994) (overruling interpretation of § 7(c) of Administrative Procedure Act set forth in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1984)); *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 348-55 (1991) (overruling prior decisions construing the Jones Act).[7]

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majority's hostility toward the application of section 3 and 4 to state court proceedings is a direct pronouncement of the principles which Justice O'Connor and Chief Justice Rehnquist dissented against in the *Southland* decision."); Wallace, *Securities Arbitration After McMahon, Rodriguez, and the New Rules: Can Investors' Rights Really be Protected*, 43 Vand. L. Rev. 1199, 1213 (1990) (analyzing *Volt* as a victory for values of federalism).

[6] As this Court explained in *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235 (1970) (overruling prior precedent in order to protect state court jurisdiction):

> Nor can we agree that conclusive weight should be accorded to the failure of Congress to respond to [a prior decision] on the theory that congressional silence should be interpreted as acceptance of the decision. The Court has cautioned that "it is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."

Id. at 241 (citation omitted); *see also Brecht v. Abrahamson*, 113 S. Ct. 1710, 1719 (1993).

[7] In *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 479-86 (1989), this Court was willing to overrule *Wilko v. Swan*, 346 U.S. 427 (1953), and thereby to overturn an interpretation of the Securities Act, 15 U.S.C. § 77n, that had stood for 36 years. Obviously, there could be no principled basis for adopting a different rule for decisions like *Southland* simply because they favored arbitration.

Amici therefore submit that *Southland* should be overruled insofar as it held that the FAA governs proceedings in state court.[8]

I. THE FEDERAL ARBITRATION ACT DOES NOT GOVERN PROCEEDINGS IN STATE COURT

The text and structure of the Federal Arbitration Act clearly indicate that it does not apply to proceedings in state court. Section 2 provides that a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 2 does not, on its face, identify which judicial forums are bound by its requirements or

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[8] Given that one Alabama decision has already been vacated in light of *Southland*, *see York Int'l v. Alabama Oxygen Co.*, 465 U.S. 1016 (1984), the Alabama courts since the decision in *Southland* have assumed that the FAA applies in state courts. *E.g., Ex Parte Alabama Oxygen Co.*, 452 So.2d 860 (Ala. 1984). But this assumption surely cannot prevent the States now appearing as *amici* from raising the issue. The question of whether *Southland* should be overruled is logically intertwined with (indeed, antecedent to) the question on which the Court granted *certiorari*: whether § 2 of the Arbitration Act requires reversal of the judgment of the Alabama Supreme Court. If the Act does not apply to state courts at all, the judgment below must be affirmed. Once a federal question is before the Court, the parties "are not confined . . . to the same arguments which were presented in the courts below." *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899); *see also Illinois v. Gates*, 462 U.S. 213, 248 (1983) (White, J., concurring) (there is no requirement that "all arguments on behalf of, let alone in opposition to, a federal claim be raised and decided below"); *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 113 S. Ct. 2173, 2178 (1993) (noting that court of appeals could decide case on issue raised by neither party).

In any event, the States are appearing as *amici* in *support* of the judgment below. It is well settled that a prevailing party or its *amici* may invoke alternative grounds for affirming a judgment and therefore may "assert in a reviewing court any ground in support of [the] judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge v. Williams*, 397 U.S. 471, 475-76 n.6 (1970).

what procedures govern its enforcement. The FAA deals with these matters in §§ 3 and 4. These implementing provisions expressly apply only to the federal courts. Section 3 provides:

> If any suit or proceeding be brought in any *of the courts of the United States* upon any issue referable to arbitration . . . the court . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . . .

9 U.S.C. § 3 (emphasis added). Section 4 specifies that a party aggrieved by another's refusal to arbitrate

> may petition any *United States district court* which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter . . . for an order directing that such arbitration proceed in the manner provided for in such agreement . . . .

9 U.S.C. § 4 (emphasis added). Section 9, which addresses the enforcement of antitrust awards, is also relevant. It provides that, "[i]f no court is specified in the agreement of the parties, then such application may be made to *the United States court* in and for the district within which such award was made." 9 U.S.C. § 9 (emphasis added).

This Court has already held that "[s]ections 1, 2 and 3 are integral parts of a whole" and that they must be read as coextensive in scope. *Bernhardt v. Polygraph Co. of America*, 350 U.S. 198, 201 (1956). The Act's implementing provisions thus provide clear evidence that § 2 extends only to federal courts.

The only textual analysis by the *Southland* majority was its contention that, if "Congress sought only to create a procedural remedy in the federal courts, there can be no explanation for the express limitation in the Arbitration Act to contracts 'involving commerce.'" *Id.* at 14. But this assertion does not prove the point.

Initially, the *Southland* majority's argument ignores the fact that Congress had powerful reasons for restricting the scope of the Act to merchants involved in commerce, so that the FAA would not extend to *every* contract (including contracts of unsuspecting consumers) in *every* case in federal court.

Moreover, even if the reference to commerce, and hence to Congress' powers under Art. I, § 8, cl. 3, was intended to provide an alternative constitutional foundation for the Act, that does not mean that the FAA should be read to govern state-court proceedings. After all, in *Prima Paint v. Flood & Conklin*, 388 U.S. 395, 404-05 (1967), this Court used the reference to commerce to conclude that the FAA could be applied in federal court diversity cases consistent with *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938),[9] yet in *Prima Paint* this Court quite deliberately did *not* hold that the FAA governs proceedings in state court. *See infra* p. 17. As Justice O'Connor has noted, "it is enough to recognize that Congress relied *at least in part* on its Article III power over the jurisdiction of the federal courts." *Southland Corp.*, 465 U.S. at 28 n.14 (dissenting opinion). For example, several rules of judicial procedure contain references to subject matters over which Congress possesses legislative authority, such as commerce and maritime affairs, yet there has never been any suggestion that these rules apply in state courts. *See id.* at 26 n.11.

In fact, the curious aspect of § 2 is not the reference to "commerce." It is instead the undisputed fact that the FAA does not create a substantive right enforceable in federal court under the jurisdictional grant of 28 U.S.C. § 1331. *See Southland*, 465 U.S. at 15-16 n.9. This result is indeed "anomal[ous]," *Moses H. Cone Hospital*, 460 U.S. at 25 n.32, and indicates that the FAA was intended only as a procedural statute that does not govern proceedings in state courts. *See Southland*, 465 U.S. at 30 n.19 (O'Connor, J., dissenting). However, following *Southland's* directive that "the Arbitration Act 'creates a body of federal substantive law'" that "requir[es] the parties to honor

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[9] *See Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 208 (1956) (Frankfurter, J., concurring).

arbitration agreements" and governs "the underlying issue of arbitrability," 465 U.S. at 12, 15 n.9 (citation omitted), courts have begun to fashion what is essentially a federal common law of arbitration agreements,[10] purportedly under the auspices of a statute that — while denominated "substantive" — does not in fact create federal subject-matter jurisdiction. This state of affairs is assuredly beyond what Congress authorized, *see* pp. 11-16, *infra*, and raises troubling Article III issues. *See, e.g., O'Melveny & Myers v. FDIC*, No. 93-489 (June 13, 1994).

For all these reasons, the facial silence of § 2 of the FAA should not be taken as a license to declare that state courts as well as federal courts must apply § 2 — particularly in light of the powerful interests of federalism at issue here. Even in ordinary pre-emption cases, federal law cannot be held to displace state law in the absence of a clear congressional statement. *See, e.g., English v. General Electric*, 496 U.S. 72, 82 (1990); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984). This requirement is heightened in areas of traditional state concern, such as the enforcement of contracts and the protection of consumers, where this Court has always "start[ed] with the assumption that the historic police powers of the States were not to be superseded by the federal act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In the context of the FAA, this Court has already held that "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Information Sciences, Inc.*, 489 U.S. at 477.

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[10] *See* Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 Va. L. Rev. 1305, 1347 (1985) (concluding, in light of this Court's decisions, that "the FAA embodies a federal policy favoring arbitration that is not confined to the express language of the Act. . . . [F]ederal courts may decide issues not expressly covered by the FAA by crafting a federal common law rule even if the otherwise applicable state law does not discriminate against arbitration."); Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 Hofstra L. Rev. 385, 387 (1992) (observing that this Court's decisions, including *Southland*, "articulate a federal common law of arbitration that replaces state law whenever the FAA is applicable").

Although this Court has recognized that the Constitution protects state sovereignty and imposes substantive limits on congressional power, *see, e.g., New York v. United States*, 112 S. Ct. 2408, 2420 (1992), this Court has emphasized that the primary protections for the States lie in the structure of government as a whole and especially in the political branches. *See Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 551 (1985). This Court has therefore held that, "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (citation omitted). Only a crystal-clear statement of congressional intent can put the States on notice of the impending displacement of state law and interference with state functions, and thus enable the political safeguards of federalism to function. "'[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests.'" *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2403 (1991) (quoting L. Tribe, American Constitutional Law § 6-25, p. 480 (2d ed. 1988)).

Where federal law purports to regulate the operation of state courts, the need for a clear statement of congressional intent is at its zenith. The control over state court dockets, including the right to a civil jury trial in the state courts, is not governed by the federal Constitution, but is a matter solely of state law and state concern. As Justice Frankfurter observed, "the States are as free from control by Congress in establishing state systems for litigation as is Congress free from state control in establishing a federal system for litigation." *Brown v. Gerdes*, 321 U.S. 178, 188 (1944) (concurring opinion).[11] "The general rule 'bottomed

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[11] *See generally Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 285, 287 (1970) (stating that "[o]ne of the reserved powers [under the Constitution] was the maintenance of state judicial systems for the decision of legal controversies" and referring to the "fundamental constitutional independence of the States and their courts"); *Fay v. Noia*, 372

deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.'" *Howlett v. Rose*, 496 U.S. 356, 371 (1990) (quoting Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954), and citing Justice O'Connor's dissent in *Southland Corp. v. Keating*).

Indeed, the choice of forum to adjudicate state-created rights is generally not subject to Congress' power to regulate at all. Thus, in *Northern Pipeline Co. v. Marathon Pipe Line*, 458 U.S. 50 (1982), this Court invalidated Congress' grant of authority to bankruptcy courts to hear claims arising under state law. A plurality explained that congressional power to intrude upon the province of the constitutional courts is at "a minimum" when it seeks "to control the manner in which [a right under state law] is adjudicated." *Id.* at 84.[12]

The decision in *Southland* threatens complete denial of access to state courts for adjudication of state-created rights whenever a business corporation chooses to insert an arbitration provision in "a contract evidencing a transaction involving commerce." This far-reaching result, which would dramatically alter the balance between federal and state judicial systems,

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U.S. 391, 466-67 (1963) (Harlan, J., dissenting) ("The right of the State to regulate its own procedures governing the conduct of litigants in its courts, and its interest in supervision of those procedures, stand on the same constitutional plane as its right and interest in framing 'substantive' laws governing other aspects of the conduct of those within its borders."); *Baltimore & O.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) ("[T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States — independence in their legislative and . . . in their judicial departments. . . . Any interference with either . . . is an invasion of the authority or the State and, to that extent, a denial of its independence.").

[12] The constitutional question cannot be avoided by reference to the parties' agreement. States that choose to make certain disputes nonarbitrable define the cause of action in advance to survive any attempt to waive the parties' right to litigate in court. The parties' agreement by itself could not override this exercise of state police power. Only the imprimatur of Congress could render the agreement preemptive of the legislative choice of forum.

should not be permitted to stand in the absence of unambiguous congressional intent. The FAA contains no evidence of such intent.

II. *SOUTHLAND CORP. v. KEATING* SHOULD BE OVERRULED

The majority in *Southland Corp. v. Keating* did not address, let alone dispute, most of the foregoing analysis of the text and structure of the FAA. Instead, the majority opinion by Chief Justice Burger relied on three highly dubious propositions (*see* 465 U.S. at 11-16) to determine that the FAA governs proceedings in state court. The majority believed: **1)** that its interpretation of the Act was ordained by the legislative history of the Federal Arbitration Act; **2)** that such a result was compelled by *Prima Paint v. Flood & Conklin*, 388 U.S. 395 (1967); and **3)** that such a result was required by pragmatic considerations, such as the need to avoid forum shopping. Each of these propositions is incorrect.

1. The majority in *Southland Corp. v. Keating* asserted that, "*[a]lthough the legislative history is not without ambiguities*, there are strong indications that Congress had in mind something more than making arbitration agreements enforceable only in the federal courts." 465 U.S. at 12 (emphasis added). This lukewarm conclusion should not be enough to outweigh the contrary implication of the statute's text and structure. Moreover, the legislative history proves precisely the opposite of what the *Southland* majority believed. As Justice O'Connor has observed, "[o]ne rarely finds a legislative history as unambiguous as the FAA's. That history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts, derived, Congress believed, largely from the federal power to control the jurisdiction of the federal courts." 465 U.S. at 25 (dissenting opinion).

Prior to 1925, the federal courts, applying general federal common law pursuant to *Swift v. Tyson*, 16 Pet. 1 (1842), generally refused in diversity cases to enforce arbitration laws

that had been adopted by several major commercial States.[13] Even if the federal courts were inclined to enforce the clauses, there was no procedure by which they could do so. Cohen and Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 275-76 (1926).

The Federal Arbitration Act was drafted by the American Bar Association's Committee on Commerce, Trade and Commercial Law to remedy this situation. It was enacted by Congress in 1925 pursuant to its constitutional powers under the Commerce Clause, Admiralty Clause, and Article III. There was no need to regulate the States, because the problem lay in the application by *federal courts* of general federal common law. Moreover, because arbitration "has long been considered procedural,"[14] Congress quite naturally did not view the FAA as creating a substantive rule of law applicable in state court.

A principal author of the Act, Julius Cohen of the American Bar Association, wrote at the time,

> [T]he statute as drawn establishes a *procedure in the Federal courts* for the enforcement of certain arbitration agreements. It is no infringement upon *the right of each state to decide for itself what contracts shall or shall not exist under its laws*. . . . [W]hether or not an arbitration agreement is to be enforced is a question of the law of *procedure* and is determined by the law of the jurisdiction wherein the remedy is sought.[15]

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[13] *See, e.g., Atlantic Fruit Co. v. Red Cross Line*, 276 F. 319 (S.D.N.Y. 1921), *aff'd*, 5 F.2d 218 (2d Cir. 1924); *Lappe v. Wilcox*, 14 F.2d 861 (N.D.N.Y. 1926).

[14] 5 Moore, Federal Practice 128 (2d ed. 1948); *see also Heckers v. Fowler*, 2 Wall. 123, 128 (1864) (upholding reference of case to arbitrator as a procedural act); *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 278 (1932) (upholding application of Arbitration Act to admiralty cases as a matter of "procedure").

[15] Cohen & Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev., at 275-276 (emphasis added).

Mr. Cohen told congressional subcommittees that "[t]he theory on which you do this is that you have the right to tell the federal court how to proceed."[16] He rejected any suggestion that the Act would affect state courts:

> Nor can it be said that the Congress of the United States, *directing its own courts* . . ., would infringe upon the provinces or prerogatives of the States. . . . [T]he question of enforcement relates to the law of remedies and *not to substantive law*. The rule must be changed for the jurisdiction in which the agreement is sought to be enforced. . . . There is no disposition therefore by means of the Federal bludgeon to force an individual State in.o an unwilling submission to arbitration enforcement.[17]

The House Report on the FAA stated that "[w]hether an agreement for arbitration shall be enforced or not is a question of procedure," not substance, and explained that "[t]he bill declares that such agreements shall be recognized and enforced *by the Courts of the United States*." H.R. Rep. No. 96, 68th

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[16] Arbitration of Interstate Commercial Disputes, Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary, 68th Cong., 1st Sess. 17 (1924) ("Joint Hearings"); *see also id.* at 38 ("The primary purpose of the statute is to make enforcible [sic] in the Federal courts such agreements for arbitration.") (statement of Mr. Cohen); Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration, Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 2 (1923) ("Senate Hearing") ("This bill follows the lines of the New York arbitration law, applying it to the fields wherein there is Federal jurisdiction"); Committee on Commerce, Trade and Commercial Law, *The United States Arbitration Act and Its Application*, 11 A.B.A.J. 153, 156 (1925) ("[The FAA] rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts. So far as congressional acts relate to the procedure in the Federal courts, they are clearly within the congressional power").

[17] Joint Hearings at 39-40 (emphasis added).

Cong., 1st Sess. 1 (1924) (emphasis added).[18] The drafting committee itself noted that the "statute providing for the enforcement of arbitration agreements does *relate solely to procedure of the Federal courts*. It is no infringement upon the right of each state to decide for itself what contract shall or shall not exist." Committee on Commerce, Trade and Commercial Law, *The United States Arbitration Act and Its Application*, 11 A.B.A.J. 153, 154-155 (1925) (emphasis added). In explaining the bill in the House of Representatives, Representative Graham assured his fellow Members of Congress that:

> This bill . . . does not involve any new principle of law except to provide a simple method by which the parties may be brought before the court in order to give enforcement to that to which they have already agreed. . . . It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts.

65 Cong. Rec. 1,931 (1924).

Contemporary commentators recognized that the Act did not impose any restrictions on the States.[19] One scholar has

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[18] To similar effect, the Senate Report noted that the New York statute, after which the FAA was patterned, had been upheld against constitutional attack the previous year in *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924). S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924). In *Red Cross*, Justice Brandeis based the Court's approval of the New York statute on the fact that the statute effected no change in the substantive law.

[19] The A.B.A. Committee that drafted the legislation wrote: "So far as the present law declares simply the policy of recognizing and enforcing arbitration agreements in the Federal courts it does not encroach upon the province of the individual states." Committee on Commerce, Trade and Commercial Law, 11 A.B.A.J. at 155. *See also* Cohen & Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. at 276-77; Baum & Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts*, 8 N. Y. U. L. Q. Rev. 428, 459 (1931). Williston wrote: "Inasmuch as arbitration acts are deemed procedural, the United States Act applies only to the federal courts." 6 S. Williston & G. Thompson, The Law of Contracts 5368 (rev. ed. 1938).

noted that, "[f]or years, courts and commentators agreed that the statute applied only in the federal courts and so governed only the few contract suits that happened to involve diversity or admiralty jurisdiction." Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 Va. L. Rev. 1305, 1305 (1985) (citing cases).[20]

More recent students of the FAA uniformly and emphatically reach the same conclusion. *Prima Paint*, 388 U.S. at 424 (Black, J., dissenting); Stipanowich, *Punitive Damages in Arbitration*, 66 B.U. L. Rev. 953, 972 n.110 (1986) ("the legislative history and contemporary writings do tend to confirm that Congress originally intended the Federal Arbitration Act as a set of procedural rules for federal courts"); Note, *The Consequences of a Broad Arbitration Clause Under the Federal Arbitration Act*, 52 B.U. L. Rev. 571, 578 (1972) ("The proponents of the Act viewed it as procedural in nature, enacted under the power of Congress to regulate the federal courts and consequently only applicable in the federal courts"); Note, *Scope of the United States Arbitration Act in Commercial Arbitration: Problems in Federalism*, 58 Nw. U. L. Rev. 468, 492 (1963) ("there is no legislative history to support a conclusion that Congress intended to make the act applicable in state courts"); Note, 73 Harv. L. Rev. 1382, 1383 (1960) ("the House committee report indicated that the act was to apply only in the federal system. . . . [Congress manifested] the understanding that the act was to regulate procedure in the federal courts"); Note, *Erie, Bernhardt, and Section 2 of the United States Arbitration Act: A Farrago of Rights, Remedies, and a Right to a Remedy*, 69 Yale L. J. 847, 863 (1960) (noting "the complete absence of congressional intent to make the federal act applicable to state court actions").

[20] Until *Southland*, many courts continued to hold that the FAA did not govern proceedings in state court. In *Ex parte Alabama Oxygen Co.*, 433 So. 2d 1158 (Ala. 1983), for example, the Alabama supreme court ruled that the FAA did not bind the States. After this Court vacated and remanded for reconsideration in light of *Southland*, *see York Int'l v. Alabama Oxygen Co.*, 465 U.S. 1016 (1984), the Alabama court simply deferred to this Court's mandate. *See Ex parte Alabama Oxygen Co.*, 452 So. 2d 860 (Ala. 1984). *See also Barron v. Tastee Freez Intern., Inc.*, 482 F. Supp. 1213, 1217 (E.D. Wisc. 1980) (assuming that the Federal Arbitration Act applied only to federal courts and stating, in adjudicating the enforceability of an arbitration clause in a diversity action, that a federal court was not required to consider any contrary state policy and might well reach a different result than a state court faced with the same issue); *Bache Halsey Stuart Shields, Inc. v. Moebius*, 531 F. Supp. 75, 77 (E.D. Wisc. 1982) (same); *Sandefer v. Reynolds Securities Inc.*, 618 P.2d 690, 691 (Colo. App. 1980) (holding state securities law claim

It was not until 35 years after passage of the Act that some judges developed the concept that there were certain substantive aspects to the FAA applicable in state as well as federal courts. *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. dismissed*, 364 U.S. 801 (1960). This suggestion stemmed from a fear that the *Erie* doctrine would prohibit the federal courts from applying the Act in diversity cases, *id.* at 404-09 — a fear that was later put to rest in *Prima Paint*. Even after the *Erie* concern surfaced, one of the judges who decided *Robert Lawrence* counseled caution because of the important state sovereignty interests at stake:

> [T]he legislative history of the Arbitration Act of 1925 reveals little awareness on the part of Congress that state law might be affected. . . . Having no clear mandate from Congress as to the extent to which state statutes and decisions are to be superseded, we must be cautious in construing the act lest we excessively encroach on the powers which Congressional policy, if not the Constitution, would reserve to the states.

Metro Industrial Painting Corp. v. Terminal Constr. Co., 287 F.2d 382, 386 (2d Cir.) (Lumbard, C.J., concurring), *cert. denied*, 368 U.S. 817 (1961).

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not arbitrable); *Pullman, Inc. v. Phoenix Steel Corp.*, 304 A.2d 334, 338 (Del. Super. Ct. 1973) (holding FAA inapplicable in state court); *Hilton Construction Co. v. Martin Mechanical Contractors, Inc.*, 303 S.E.2d 119, 123 (Ga. App.) (holding FAA inapplicable in state court and noting that "the all inclusive aspects of the Act are directed only to the federal courts"), *aff'd*, 308 S.E.2d 830 (Ga. 1983); *Kress Corp. v. Edward C. Levy Co.*, 430 N.E.2d 593, 595-96 (Ill. App. 1981) (reading *Prima Paint* as holding merely that "Federal courts [should] apply the Federal act" and concluding that the FAA does not govern proceedings in state court); *Downing v. Allstate Insurance Co.*, 335 N.W.2d 139, 142 (Mich. App. 1983) (Kelly, J., concurring) ("I find the federal arbitration act wholly inapplicable to these state court proceedings"); *Thayer v. American Financial Advisers, Inc.*, 322 N.W.2d 599, 603 (Minn. 1982) (holding FAA inapplicable in state court).

2. In *Prima Paint*, a diversity action, this Court deliberately declined to hold that the Act applied in any respect in the state courts. The *Prima Paint* Court was asked to hold, based on the reasoning of *Robert Lawrence*,[21] that the Federal Arbitration Act applies in state courts and that it is a national substantive law. The Court refused to do so, stating that "the question is whether Congress may prescribe how *federal courts* are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate. The answer to that can only be in the affirmative." 388 U.S. at 405 (emphasis added). One Justice was willing to adopt wholesale the Second Circuit's more broadly written opinion. *See* 388 U.S. at 407 (Harlan, J., concurring).

But the majority opinion in *Prima Paint* "carefully avoided any explicit endorsement of the view that the Arbitration Act embodied substantive policies that were to be applied to all contracts within its scope, whether sued in state or federal courts." P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 810 (3d ed. 1988). Justice Black took pains to point out:

> The Court here does not hold . . . that the body of federal substantive law created by federal judges under the Arbitration Act is required to be applied by state courts. A holding to that effect — which the Court seems to leave up in the air — would flout the intention of the framers of the Act.

388 U.S. at 424 (dissenting opinion). Nothing in the *Prima Paint* majority opinion contradicts this statement. *Prima Paint* thus provides no support for the holding in *Southland Corp. v. Keating*, and the *Southland* majority's reliance on *Prima Paint* was entirely unjustified.

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[21] In *Robert Lawrence*, the Second Circuit had announced — in dictum — that the FAA was "a declaration of national law equally applicable in state or federal courts." 271 F.2d at 407.

3. Finally, the *Southland* Court relied on pragmatic considerations, primarily the supposed danger of forum shopping, to conclude that § 2 of the FAA creates a substantive rule of law applicable to state as well as federal courts. *See* 465 U.S. at 15-16. But the Court's reasoning was persuasively rebutted by Justice O'Connor:

> In controversies involving incomplete diversity of citizenship, there is simply no access to federal court and therefore no possibility of forum shopping. In controversies *with* complete diversity of citizenship the FAA grants federal-court access equally to both parties; no party can gain any advantage by forum shopping. Even when the party resisting arbitration initiates an action in state court, the opposing party can invoke FAA § 4 and promptly secure a federal-court order to compel arbitration.

465 U.S. at 34 (dissenting opinion). Justice O'Connor might have added that, if forum shopping were truly a serious danger, it is difficult to understand why it had not surfaced during the first 60 years of the Act's existence.

Ironically, the FAA was adopted to *cure* the problem of forum shopping created by federal courts' application of general federal common law in diversity cases.[22] The drafters of the FAA might have addressed the matter by requiring federal courts sitting in diversity to follow the arbitration law of the State in which they sat. However, the statute's framers deliberately chose a different approach. They decided to adopt a uniform federal law that would make arbitration agreements enforceable even in federal courts located in States that had no arbitration

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[22] *See* Joint Hearings at 16 (statement of Julius Cohen of the American Bar Association); Senate Hearing at 2; Cohen & Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev., at 275-76; Sturges & Murphy, *Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act*, 17 Law & Contemp. Prob. 580, 590 (1952).

law.[23] And, instead of "bludgeon[ing] States into compliance" with the new federal law, *Southland*, 465 U.S. at 34 (dissenting opinion), the FAA's drafters opted to press for passage of coordinated state legislation applicable in state court. Accordingly, the key language of the Uniform Act for Commercial Arbitration is identical to that of § 2 of the FAA.[24]

A total of 45 States have now enacted modern statutes to facilitate arbitration, with 34 States and the District of Columbia adopting the Uniform Act. *See* 7 U.L.A. 1 (Supp. 1993). Many States, however, have chosen to adopt statutory exclusions to protect consumers and others of unequal bargaining power or information.[25] Of course, *Southland* effectively nullifies the power of state courts to give effect to such exclusions.

In sum, if there is a danger of forum shopping, it is one accepted by the framers of the FAA and one that they have addressed with a carefully devised plan — a plan that this Court obliterated in *Southland* with its extravagant reading of the Act.

CONCLUSION

For all of the foregoing reasons, *Southland Corp. v. Keating* should be overruled insofar as it extended the FAA to state court proceedings, and the judgment below should be affirmed.

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[23] *See, e.g.*, Joint Hearings at 35.

[24] *See* 47 A.B.A. Rep. 318 (1922); Joint Hearings at 28.

[25] Variations include statutory exclusions as to medical malpractice, *e.g.*, Alaska Statutes § 09.55.535, Ga. Stat. §9-9-2(c)(1); contracts involving consumers, *e.g.*, Ga. Stat. § 9-9-2(c)(5), (6), (7), Mont. Code Ann. § 27-5-114(2)(b); employer-employee disputes, *e.g.*, Ky. Revised Stat. § 417.050, La. Revised Stat. § 9:4216, Ann. Code of Md. § 3-206(b), N.C. Gen. Stat. § 1-567.2(b)(2), Tex. Rev. Civ. Stat. Ann. art. 224, West Va. Stat. § 55-10-1; torts, *e.g.*, Ark. Code Ann. § 16-108-201, Ga. Stat. § 9-9-2(c)(10), Iowa Code Ann. § 697A.1(2)(c), Mont. Code Ann. § 27-5-114(2)(a); uninsured motorists, doctors and lawyers, *e.g.*, 14 Me. Revised Stat. § 5948, S.C. Code § 15-48-10; and contracts of adhesion, *e.g.*, Iowa Code Ann. § 697A.1(2)(a).

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